United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1585

United States Court of Appeals

for the

SECOND CIRCUIT

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76-7585

NORMAN E. WHITNEY, PLAINTIFF-APPELLAN

vs.

HERBERT WEEKS, *et al*, DEFENDANTS-APPELLEES

BRIEF OF DEFENDANTS-APPELLEES

John E. Donnelly, Esquire
Assistant Prosecuting Attorney
Drawer H. Amity Station
New Haven, Connecticut 06525

From United States
District Court, District
of Connecticut

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Whether these two state prosecuting attorneys are amenable to suit under 42 U.S.C.A. §1983 *et seq*, based upon the facts alleged in the complaint?

II. STATEMENT OF THE CASE

A. *Nature of the Case*

Alleging a deprivation of his constitutional rights, the plaintiff brought this civil action under the Civil Rights Act of 1871, 42 U.S.C.A. §1983 *et seq*, against a judge of the Connecticut Circuit Court,[1] two state prosecuting attorneys and two members of the East Hartford, Connecticut, Police Department.

On behalf of the defendants judge and prosecutors only, the United States District Court for the District of Connecticut, Blumenfeld, J., granted motions to dismiss the complaint because of its "failure to state a claim upon which relief can be granted . . ." Rule 12(b)(6), Federal Rules of Civil Procedure. The two defendant police officers were not parties to the motions to dismiss.

This appeal is from that portion of the partial judgment relative to the two state prosecutors.

B. *Statement of Facts*

On January 30, 1976, the plaintiff, an attorney, brought this action, pro se, against the defendants, Eugene Kelly and John Lombardo; the defendant, David H. Jacobs, and others, under

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[1] The Circuit Courts were merged into the Courts of Common Pleas as of December 31, 1974. Connecticut Public Act 74-183 (1974).

42 U.S.C. §1983, et seq., seeking damages for deprivation of his civil rights allegedly caused by Kelly, Lombardo, Jacobs and others.

At the time the events which are the basis of this action occurred, Kelly and Lombardo were prosecutor and assistant prosecutor, respectively, of the then 12th Circuit Court,[3] and Jacobs was Chief Judge of the then 12th Circuit Court.

This appeal is from the granting of a Federal Civil Procedure Rule 12(b)(6) motion to dismiss the complaint against Kelly, Lombardo and Jacobs, brought with regards to Kelly and Lombardo only. The complaint alleges that on January 31, 1974, the plaintiff accompanied his client in a divorce action to the jointly owned premises occupied by the client's estranged husband. After the client entered the premises, two police officers, named defendants in this action, arrived and entered the premises with the plaintiff. An altercation arose concerning the rights of the plaintiff and his client to be on the premises. The plaintiff was eventually arrested for interfering with a police officer whom the plaintiff alleges assaulted him. The complaint is silent regarding who called the police or to the factual underpinnings which precipitated the plaintiff's arrest.

Thereafter, the complaint alleges that in conducting his own criminal defense, the plaintiff pleaded not guilty to the aforementioned charge and discussed the case with Lombardo whom, the plaintiff claims, offered "to see that the charges were dismissed" if the plaintiff would sign forms releasing the defendant police officers and the Town of East Hartford from any civil liability. The complaint does not allege that any releases were actually executed.

The complaint alleges that the plaintiff filed a motion to dis-

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[3] Id.

miss on March 15, 1974, and on March 28, 1974, he telephoned Lombardo and was told the charge against him was nolled. The complaint alleges that the plaintiff then telephoned the 12th Circuit Court clerk's office and was told that there was no motion to dismiss in the file at which time he filed a second motion to dismiss. The complaint further alleges that in early April, 1974, the plaintiff was telephonically notified by the clerk's office that his motion to dismiss was set down for argument on April 8, 1974, but when he appeared in court that day, Kelly, who was prosecuting, asked him during a court recess why he was there. When informed, Kelly told the plaintiff that neither he nor Lombardo, who was out of town, were aware that argument on the plaintiff's motion had been set down for that date. Kelly then invited the plaintiff to the presiding judge's chambers to discuss the matter. The judge heard the plaintiff's story and went to the clerk's office from which he returned after a few minutes stating that the charge had been nolled, and he would not listen to an argument by plaintiff.

After alleging the foregoing, the plaintiff states that he wrote the defendant, Judge Jacobs, explaining the actions of Kelly and Lombardo. Subsequently, Judge Jacobs notified the plaintiff that the matter had been investigated by the Criminal Justice Division, and that there was no merit to the plaintiff's complaint.

On February 25, 1975, defendants, Kelly and Lombardo filed a motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(6). The defendant, Jacobs, filed a similar motion on March 19, 1976. On August 16, 1976, the United States District Court, District of Connecticut, Blumenfeld, J., filed a ruling on the aforementioned motions dismissing the complaint on behalf of Kelly, Lombardo and Jacobs. On October 15, 1976,

a partial judgment was entered thereon. On November 12, 1976, the plaintiff appealed the partial judgment as to Kelly and Lombardo.

III. ARGUMENT

The general rule on dismissals apply herein, and the test upon review is that a complaint will not be dismissed unless it appears that the plaintiff could "prove no set of facts [contained in the complaint] in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed. 2d 80. See 5 Wright and Miller, Federal Practice and Procedure: Civil §1366 at p. 682 (1969 Ed.).

The sole issue to be decided on this appeal is whether, in the factual context of this case as evinced in the pleadings, an action for monetary damages brought pursuant to 42 U.S.C. §1983, et seq., may li against the two state prosceutors. The decision in *Imbler v. achtman,* 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed. 2d 128 (1976), is dispositive of this appeal.

Section 1983 provides that a person who acts under color of state law to deprive another of a constitutional right is subject to a civil suit in damages.[8]

In *Imbler,* the petitioner, Imbler, brought an action under §1983 against a prosecutor whom he alleged knowingly and

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[8] 42 U.S.C. §1893, originally enacted as §1 of the Civil Rights Act of 1871, 17 Stat. 13, states in full:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

intentionally used perjured testimony to obtain Imbler's California conviction for first-degree felony murder for which he was sentenced to death. A United States District Court had determined in a habeas proceeding that the prosecution culpably used misleading and false testimony in obtaining the conviction and ordered that Imbler be retired or set free. After the state declined to retry him, Imbler brought a §1983 suit against Pachtman, the prosecutor at his trial. The United States District Court granted Pachtman's Federal Rule of Civil Procedure 12(b)(6) motion to dismiss based on Pachtman's claim of prosecutorial immunity from suit under §1983. The United States Court of Appeals for the Ninth Circuit affirmed the decision of the District Court, 500 F.2d 1301, and the United States Supreme Court "granted certiorari to consider the important and recurring issue of prosecutorial liability under the Civil Rights Act. 420 U.S. 945, 95 S.Ct. 1324, 43 L.Ed. 2d 423 (1974)." 424 U.S. at ....., 96 S.Ct. ....., 47 L.Ed. 2d at 135. The Court held that Pachtman was acting within the scope of his duties as a prosecutor "in initiating a prosecution and in presenting the State's case . . . [and was] immune from a civil suit for damages under §1983." 47 L.Ed. 2d at 144. The Court further indicated, that while Pachtman's conduct, using perjured testimony and deliberately withholding exculpatory information, was reprehensible, the proper sanction was criminal prosecution and disbarment. 47 L.Ed. 2d at 144, n. 34.

The factual situation in *Imbler* and its concomitant theme of abuse of power, unethical conduct and criminal actions by the prosecutor, illustrates the broad factual parameters within which a prosecutor may act and be accorded immunity from tort liability under §1983. The common denominatory among *Imbler,* the dozens of cases cited therein which enunciate the

principle of prosecutorial immunity,[4] and the Kelly-Lombardo scenario herein, is that their "activities were intimately associated with the judicial phase of the criminal process, and thus they were functions to which the reasons for absolute immunity apply with full force." 47 L.Ed. 2d at 143.

The decision in *Imbler* certainly did not fashion the principle of immunity for prosecutors from §1983 liability. Tort immunity for prosecutors acting within the scope of their duties existed at common law as it did for judges and grand jurors. 47 L.Fd. 2d at 138-139; 47 L.Ed. 2d at 139, n. 20. The principle of common law prosecutorial immunity was first brought to the United States Supreme Court in *Yaselli v. Goff*, 12 F.2d 396 (2d Cir. 1926), aff'd per curiam, 275 U.S. 503, 48 S.Ct. 155, 72 L.Ed. 305, "In our opinion the law requires us to hold that . . . [the prosecutor] . . . in the performance of the duties imposed upon him by law, is immune from a civil action for malicious prosecution based on an indictment and prosecution, although it results in a verdict of not guilty rendered by a jury. The immunity is absolute, and is grounded on principles of public policy." *Yaselli v. Goff*, 12 F.2d at 406 (2d Cir. 1926), quoted in *Imbler v. Pachtman*, 47 L.Ed. 2d at 139.

The considerations upon which the common law immunity of a prosecutor reposes include "concern that harassment by unfounded litigation would cause a defection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment requred by his public trust." 47 L.Ed. 2d at 139.

"The common-law rule of absolute immunity is thus well settled. We now must determine whether the same considera-

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[4] 47 L.Ed. 2d at 138, n. 16, 140, n. 21.

tions of public policy that underlie the common law rule likewise countenance absolute immunity under §1983. We think they do." 47 L.Ed. 2d at 140. The extension of the common-law absolute immunity from tort liability to §1983 actions is conceptually sound since that statute merely created "a species of tort liability," 47 L.Ed. 2d at 136, which did not exist at common law but was enacted as part of the Civil Rights Act of 1871.[8] In *Tenny v. Brandhove*, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951), the Court construed §1983 as not abrogating "those immunities which historically, and for reasons of public policy, had been accorded to various categories of officials . . . The decision in *Tenney* established that §1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." 47 L.Ed. 2d at 136.

In extending the common-law rule of absolute immunity for prosecutors to §1983 actions, the Court in *Imbler* expressly rejected the argument that a prosecutor had only a qualified immunity in §1983 actions because "[i]f a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution . . . We conclude that the considerations outlined above[9] dictate the same

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[8] The Court strongly intimated that mere status as opposed to functional activities as a prosecutor was insufficient for absolute immunity but provided a good-faith defense comparable to that of policemen. 47 L.Ed. 2d at 143.

[9] "If a prosecutor had only a qualified immunity, the threat of §1983 suits would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court. The public trust of the prosecutor's office would suffer if he were

constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Cf. *Bradley v. Fisher*, 13 Wall, at 348, 20 L Ed 646; *Pierson v. Ray*, 386 US, at 554, 18 L Ed 2d 288, 87 S Ct 1213. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."

"Moreover, suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor. The prosecutor's possible knowledge of a witness' falsehoods, the materiality of evidence not revealed to the defense, the propriety of a closing argument, and — ultimately in every case — the likelihood that prosecutorial misconduct so infected a trial as to deny due process, are typical of issues with which judges struggle in action for post-trial relief, sometimes to differing conclusions. The presentation of such issues in a §1983 action often would require a virtual retrial of the criminal offense in a new forum, and the resolution of some technical issues by the lay jury. It is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials. Frequently acting under serious constraints of time and even information, a prosecutor inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials. Cf. *Bradley v. Fisher*, 13 Wall, at 349, 20 L Ed 646."

"The affording of only a qualified immunity to the prosecutor also could have an adverse effect upon the functioning of the criminal justice system. Attaching the system's goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify, as is illustrated by the history of this case. If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence."

"The ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to §1983 liability. Various

> post-trial procedures are available to determine whether an accused has received a fair trial. These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law. This focus should not be blurred by even the subconscious knowledge that a post-trial decision in favor of the accused might result in the prosecutor being called upon to respon' in damages for his error or mistaken judgment." 47 L.Ed. 2d at 140-141.

absolute immunity under §1983 that the prosecutor enjoys at common law." 47 L.Ed. 2d at 140-142.

Prosecutorial immunity is not quasi-judicial in nature such as that enjoyed by court officers for purely ministerial acts, but a derivative form of immunity which cloaks prosecutors with the same immunity granted to judges when they are acting within the scope of their duties. *Duba v. McIntyre,* 501 F.2d 590, 592 (8th Cir. 1974). This immunity exists even for acts in excess of their power. 501 F.2d at 592-593. Compare *Robichaud v. Ronan,* 351 F.2d 533 (9th Cir. 1965).

In *Gregoire v. Biddle,* 177 F.2d 579 (2d Cir. 1949), this Court affirmed the decision of the district court that the federal prosecutors were absolutely immune from liability from suit under the Civil Rights Act, even though their actions in incarcerating the plaintiff unlawfully had been induced by personal ill-will. The prosecutor, wrote Hand, C. J., "when engaged in prosecuting private persons enjoys the same absolute privileges as judges." 177 F.2d at 580.

> "[t]he official, who is in fact guilty of using his power to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and if it were possible in practice to confine such complaints to the

> guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burdens of a trial and to the inevitable danger of outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." 177 F.2d at 579.

In his brief, the plaintiff submits that because the misdemeanor with which he was charged[8] was nolled after a plea of not guilty was entered by him, the immunity afforded by *Imbler* is vitiated because the case did not go forward to trial. The thrust of *Imbler* is clearly directed toward the functional nature of the prosecutor's role as distinguished from a *per se* title or position. The Connecticut Practice Book expressly granted Circuit Court prosecuting attorneys the authority to *nolle prosequi* a given case. Practice Book §839 (changed to §2136 on October 1, 1976). This authority to *nolle prosequi* a charge, then, is an integral facet of the prosecutorial function. It would be ludicrous to hold, as the plaintiff suggests, that a prosecutor loses immunity if he nolles a case but would not lose it if he went forward to trial on a case without regard to its merits.

Kelly and Lombardo were acting within the scope of their duties as prosecutors in each and every activity which the complaint presents as a basis upon which a §1983 action might lie.

According to the complaint, the plaintiff's first encounter with Lombardo in this matter was following his arrest for interfering with a police officer and when he discussed the

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[8] Connecticut General Statutes §53a-167a.

charge against him with Lombardo on February 8, 1974, at which time Lombardo allegedly sought to have the plaintiff release the police officers and the municipality from civil liability. "The plaintiff refused and left [the prosecutor's office]." Next, the plaintiff avers that he wrote Lombardo on February 18, 1974, asking him to "approve my motion for a bill of particulars" which motion had previously been denied by the court at the time of his plea.*

The plaintiff states that he wrote Lombardo again on March 18, 1974, asking Lombardo to subpoena an attorney named Cantor, a judge named Radin, Patrolman Sutton (named defendant in this suit) and Ethel Riley, who was the plaintiff's client. The complaint avers that the plaintiff did not receive a response from Lombardo except on March 15, 1974, when he received a postal card from Lombardo offering to discuss the case. The plaintiff stated that he "refused to do so."

Next the complaint states that the plaintiff and Lombardo agreed to a two-day continuance for the trial. The final plaintiff-Lombardo contact stated in the complaint was a March 28, 1974, telephone conversation in which Lombardo told the plaintiff that the charge against him had been nolled.

According to the complaint, then, the activities of Lombardo which the plaintiff claims are a basis of his §1983 action are one office discussion of the charge; two letters sent to Lombardo by the plaintiff concerning a motion already denied by the court and a request that Lombardo subpoena for the plaintiff's trial, among others, the plaintiff's own client; a postal card from Lombardo to the plaintiff offering the plaintiff an

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* Practice Book §495, then in effect and applicable to Circuit Court Procedure, provides that the court may order the prosecutor to furnish a bill of particulars.

opportunity for a pretrial discussion of the case; and, finally, a telephone conversation in which Lombardo told the plaintiff that he had nolled the charge.

According to the complaint, the sole activity of Kelly which the plaintiff claims are a basis of his §1983 action consist of a conversation on April 8, 1974, whereby Kelly saw the plaintiff sitting in the courtroom, asked why he was present and then invited him to the judge's chambers to discuss the plaintiff's motion. The gravaman against Kelly was that he was unaware that such a motion was supposedly set down for argument.

Each and every act done or word spoken by Lombardo and Kelly as alleged in the complaint, directly and specifically concerned the handling and the disposition by nolle of the charge against him. There are no allegations against either defendant regarding the events of January 31, 1974, which culminated in the plaintiff's arrest or the investigation preceding it. The statement by the plaintiff in his brief that Lombardo committed certain criminal offenses is wholly scurrilous. The defendant Lombardo at no time has been charged of either offense nor with any other. Lombardo and Kelly played no part in this factual situation except that imposed upon them by their official position. See *Tanale v. Sheehy*, 385 F.2d 866, 868 (2d Cir. 1967). Therefore, they possess immunity from civil liability on a suit brought under §1983. The partial judgment rendered by the District Court as to Kelly and Lombardo should be affirmed.

IV CONCLUSION

The District Court's partial judgment should be affirmed upon the authority of *Imbler v. Pachtman,* supra.